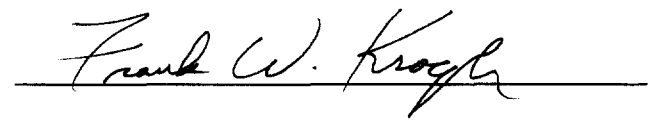
safeguard against access discrimination and other forms of anticompetitive conduct, and CEI has proven to be woefully inadequate to prevent such conduct in actual practice. The results of recent audits similarly demonstrate that cross-subsidization continues unabated by price cap regulation or the accounting rules. Problems of discrimination and cross-subsidization are especially rampant at the intrastate level, which is unaffected by this Commission's nonstructured regulations.

Meanwhile, the supposed benefits from the elimination of structural separation are proving to be thinner as time passes. Even as several years of integrated BOC enhanced services, voice messaging service appears to be the only one in which they have made substantial headway. More importantly, there still has been no showing, after all this time, that structural integration made any difference or that other providers could not have met the same demand for the same services at comparable rates while the BOCs were under a structural separation regime. The BOCs no longer claim any economies from unseparated services arising from technical integration with the network or that are unique to them, nor do they claim that they are providing unique services. With the claimed benefits reduced to such modest levels and the safeguards so diminished, the continuing BOC abuses drive any

reasonable cost-benefit analysis away from structural relief. Structural separation must be maintained.

Respectfully submitted,

By: 

Frank Krogh
Donald J. Elardo
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-2372

Dated: April 7, 1995

EXHIBIT A

b. The FCC Completely Ignored Evidence Demonstrating the Ineffectiveness of ONA and Other Nondiscrimination Requirements

The FCC studiously avoided any consideration at all of some of the most significant, relevant evidence bearing on the inadequacy of ONA and the nondiscrimination requirements. First, the FCC completely overlooked, for the third time, a substantial body of evidence originally introduced by MCI, and ignored by the FCC, in the ONA Proceeding demonstrating the ineffectiveness of ONA in combatting access discrimination. MCI introduced the same evidence in the ONA Remand Proceeding, where it was ignored again, and, most recently, in the proceeding below. This evidence consisted of over one hundred pages of deposition extracts containing admissions by BellSouth employees that:

- the same BellSouth personnel who determine which enhanced services BellSouth will provide are also responsible for approving or rejecting new ONA service requests from competing ESPs, and
- ESPs' requests for network service features are subject to a screening procedure that BellSouth's own enhanced service operations avoid when they request new network features.[62]

The testimony also contained admissions that:

- ONA will not make available to ESPs any new services that would not otherwise have been made available in the absence of ONA;

---

[62] See MCI Comments at 80-81 (J.A. 1742-43). The relevant pages of the deposition testimony are attached to and cited in MCI's Petition for Reconsideration in the ONA Proceeding, a copy of which was also submitted, with the deposition extracts, under cover of an ex parte letter from Frank W. Krogh, MCI, to Donna R. Searcy, Secretary, FCC (Mar. 15, 1991) in the Structural Remand Proceeding [hereinafter MCI Mar. 15 ex parte letter] (J.A. 1992-94). The cited pages of the deposition testimony appear in the Joint Appendix under the name of each deponent, in alphabetical order (J.A. 2542-2675).

- No objective criteria are used to set the price of intrastate basic services offered to ESPs, and intrastate prices will not be based on costs;

- The ONA regime cannot be "self-enforcing" in controlling discrimination, as was promised, because ESPs have no meaningful participation in the process of how or why ONA service requests are approved or rejected.[63]

In the ONA Proceeding itself, the FCC excused its refusal to consider this evidence on the grounds that "[t]hese arguments raise issues decided in the Computer III proceeding and are inappropriately raised in seeking reconsideration of the BOC ONA Order."[64] Now, of course, that excuse is gone. The proceeding below was conducted for the very purpose of reconsidering the structural separation issues remanded by this Court in vacating the Computer III orders.[65] Whatever issues were "decided" in Computer III were thus open for de novo review in the proceeding below.[66] The failure to consider this significant evidence undermining its position on such a crucial issue, for the third time, renders the Order arbitrary and capricious.[67]

The second category of discrimination-related evidence

---

[63] See MCI ONA Recon. Pet. at 5-7, 11, 13-25 (J.A. 452-54, 458, 460-72); MCI ONA Recon. Reply at 4-9 (J.A. 476-81). MCI also pointed out that the situation was probably the same for the other BOCs. MCI ONA Recon. Pet. at 16 n.30 (J.A. 463).

[64] ONA Reconsideration Order, 5 FCC Rcd at 3098 n.36 (J.A. 541).

[65] NPRM, 6 FCC Rcd at 174-75 (J.A. 915-17).

[66] The vacating of the Computer III orders deprived them of any binding effect, thus "clear[ing] the path for future relitigation of the issues." United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950).

[67] Office of Communication of the United Church of Christ v. FCC, 779 F.2d 702, 714 (D.C. Cir. 1985). See also, e.g., City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1171 (D.C. Cir. 1987).

ignored by the FCC consists of the many examples of different types of BOC access discrimination and other anticompetitive conduct submitted below. MCI introduced sworn testimony from the U.S. District Court proceeding reviewing the MFJ restrictions demonstrating the BOCs' practices of raising ESPs' costs unreasonably and withholding necessary interconnection features.[68] The Association of Telemessaging Services International Inc. ("ATSI") described numerous examples of access discrimination by BOCs against competitive VMS providers, including unequal interconnections.[69] The process of requesting and actually receiving new ONA features is more akin to tooth extraction than the cooperative process envisioned in Computer III.[70]

Moreover, in July 1991, the U.S. District Court overseeing the MFJ, in reviewing the remaining portion of the ban on BOC information services, confirmed the ineffectiveness of ONA in preventing access discrimination.[71] As it found, "ONA is still developing and evolving, and its success in enabling competitors

---

[68] MCI Comments at 26-30 (J.A. 1688-92); sworn statements attached as Exhibits in Support of MCI's Opposition to Motion for Removal of the Information Services Restriction in the Modification of Final Judgment, MFJ Proceeding (Oct. 17, 1990) [hereinafter MCI MFJ Exhibits], attached to MCI Mar. 15 ex parte letter (J.A. 2050-2440).

[69] ATSI Comments at 10-22 (J.A. 1375-87). See also Iowa Network Services Comments at 16-26 (J.A. 1633-43); AccessPlus Communications Comments at 8-20 (J.A. 980-92); Ex parte letter from Marc S. O'Krent, President, The Telephone Connection of Los Angeles, Inc., to Donna Searcy, Secretary, FCC (Nov. 11, 1991) [hereinafter O'Krent letter] (J.A. 3117-21).

[70] One VMS provider describes, in two chronologies totaling 93 pages, the Kafkaesque nightmare of trying to obtain useful ONA services from the BOCs. AccessPlus Communications Comments at 18-20 and Att. A and B (J.A. 990-1085).

[71] United States v. Western Electric Co., 767 F.Supp. 308 (D.D.C.), appeal docketed, No. 91-5263 (D.C. Cir. Aug. 30, 1991).

in the information services market to obtain the features they need is entirely unproven."[72] Moreover,

> [a]s for those ONA rules that have been in place over the last several years, they have already provided some indication of their lack of effectiveness: they have not prevented the Regional Companies from discriminating against their competitors in the few markets in which such discrimination was at all feasible.[73]

The District Court found, based on much of the same sworn testimony introduced by MCI in the record below,[74] that the BOCs "have... managed to engage in [anticompetitive] conduct" in those information service markets which they have entered, such as VMS.[75]

Although the District Court's opinion was submitted in the record below in an ex parte filing,[76] the FCC ignored it. The FCC's "see-no-evil, hear-no-evil, speak-no-evil" approach to the pivotal issue in its cost-benefit analysis is totally "antithetical to reasoned decisionmaking." International Ladies Garment Workers' Union v. Donovan, 722 F.2d 795, 815-17 (D.C. Cir. 1983) (failure to consider alternative approach), cert. denied, 469

---

[72] Id. at 319.

[73] Id. at 319 n.55 (emphasis added). Among other examples of discriminatory conduct, the court cited the access discrimination that was the basis for the Ga. MemoryCall Order. Id. at 320 n.57.

[74] Compare id. at 320-23 with MCI Comments at 26-28 (J.A. 1688-90) and MCI MFJ Exhibits attached to MCI Mar. 15 ex parte letter (J.A. 2050-2440). Notwithstanding these findings, the District Court removed the information services restriction, "albeit with considerable reluctance," Western Electric Co., 767 F. Supp. at 327, based on an unusual technical legal standard set down by the Court of Appeals for review of the MFJ restrictions.

[75] 767 F. Supp. at 323.

[76] Ex parte Filing of Telephone Answering Services of the Mountain States (Aug. 27, 1991) (J.A. 3010-57).

U.S. 820 (1984).

Except for the Ga. MemoryCall Order, the FCC never addressed or even acknowledged this vast record of recent BOC access discrimination, nor did it ever suggest any reason to regard actual experience since the ONA Orders as irrelevant. In fact, it found that "[o]ur experience with ONA since that time [the California I decision] serves to reaffirm this conclusion [that ONA is effective]." 6 FCC Rcd at 7599 (J.A. 3161). It was arbitrary for the FCC to base its finding that ONA is effective on its "experience" under ONA, while ignoring the most significant, relevant evidence of the nature of that experience.

The FCC's discussion of the Ga. MemoryCall Order drives home the unreasonableness of the FCC's decision, since it concedes the discriminatory nature of BellSouth's conduct.[III] There is no explanation of how that discriminatory "experience... serves to reaffirm" the effectiveness of ONA.

The FCC does suggest that ONA was not fully in place during the time period relevant to the Ga. MemoryCall Order and that there is thus no reason to believe that ONA is not effective.[IV] If ONA was not fully in place, however, it was irrational for the FCC to base its decision on its "experience with ONA since" California I, because if ONA was not in place, there has been no "experience with ONA." That is precisely the type of "self-

---

[III] Order, 6 FCC Rcd at 7623 n.211 (J.A. 3185).

[IV] Id.

contradiction" that marks an agency order as arbitrary and capricious.[29/]

The FCC's ONA regime is irrelevant for another reason as well. Most VMS providers, such as those involved in the proceeding resulting in the Ga. MemoryCall Order, are local in nature (whether or not they are capable of terminating interstate calls), and use intrastate BOC access services, including intrastate ONA services.[30/] The FCC's ONA rules and the BOCs' federal ONA tariffs, filed pursuant thereto, are therefore irrelevant to the problems of access discrimination faced by many ESPs at the state level.[31/]

The FCC has held, in the ONA Proceeding, that since "our jurisdiction over intrastate tariffed services is limited,... we scrutinize BOC state tariffing proposals to ensure only that they do not undermine fundamental ONA objectives."[32/] Under that loose standard, the FCC's approval of the BOCs' proposed intrastate ONA tariffs in the ONA plans[33/] is meaningless. For example, although BellSouth had tariffed one of the ONA services

---

[29/] See American Tel. & Tel. Co. v. FCC, 836 F.2d 1386, 1391 (D.C. Cir. 1988).

[30/] See, e.g., BellSouth Reply Comments at 2, 9-11, BellSouth's Petition for Emergency Relief and Declaratory Ruling, DA 91-757 (Aug. 6, 1991) [hereinafter BellSouth Emergency Pet.], att. to ex parte letter from Gary J. Dennis, Bell South, to Donna Searcy, Secretary, FCC (Oct. 8, 1991) (acknowledging widespread use of intrastate ONA services by VMS providers) (J.A. 3096-99).

[31/] MCI discussed this gap in the FCC's proposed system of nonstructural "safeguards" in its Comments at 42-45 (J.A. 1704-07).

[32/] BOC ONA Order, 4 FCC Rcd at 148 (J.A. 432A).

[33/] See BOC ONA Amendment Order, 5 FCC Rcd at 3112-13 (J.A. 551-52); BOC Further Amendment Order, 6 FCC Rcd at 7664 (J.A. 573).

needed by VMS competitors of its MemoryCall service in Georgia, that service was not actually usable by most VMS providers in most BellSouth local exchange central offices in Georgia because it was not compatible with the central office equipment. BellSouth's MemoryCall service, however, was designed around that technical incompatibility so that it could use that ONA service in every central office, giving it a tremendous advantage.[39]

There is, accordingly, nothing in the record to indicate that VMS providers generally will soon have access to the features they need under the BOCs' state ONA tariffs, and thus nothing to indicate any significant change from the discriminatory access found in the Ga. MemoryCall Order. Without such access, there is no support for the FCC's decision to eliminate structural separation.

B. The FCC Ignored or Trivialized Substantial Evidence That Its Cost Accounting Safeguards Would Be Inadequate to Prevent or Even Detect Cross-Subsidization by the BOCs

Prior to Computer III, the FCC consistently had rejected accounting separation as a viable regulatory mechanism to protect

---

[39] Cox Enterprises Comments at 17-22, BellSouth Emergency Pet. (July 23, 1991), attached to ex parte letter from J.G. Harrington to Peggy Reitzel, FCC (July 23, 1991) (J.A. 2993-98); Ga. MemoryCall Order at 27-30 (J.A. 2940-43). Moreover, BellSouth defended its failure to upgrade its switches to allow such compatibility for other VMS providers as being perfectly consistent with the FCC's ONA unbundling criteria. BellSouth Reply Comments at 22-27, BellSouth Emergency Pet. (J.A. 3102-07). Similarly, the Telephone Connection of Los Angeles pointed out, just one month before the release of the Order below, that a tariffed Pacific Bell ONA service required for the provision of competitive services by VMS providers was not available in many Pacific Bell central offices, rendering it useless for VMS providers. O'Krent letter at 3-4 (J.A. 3119-20).

interstate ONA services at this time."[28] If ESPs cannot use ONA services for whatever reason, ONA obviously will not be a safeguard against discrimination. The Order below failed to consider this shortcoming.

3. The Order Below Failed to Address Adequately the Voluminous Evidence on the Issue of Discrimination

MCI/NAA's initial brief demonstrated that the Order failed adequately to consider sworn testimony that the BOCs were not planning to implement meaningful ONA as well as voluminous evidence of widespread, chronic access discrimination against ESPs, focusing especially on the Ga. MemoryCall Order. In its brief, the FCC brushes aside this evidence as "anecdotal" and suggests that it was too insignificant to be considered. FCC Br. at 61-62.

The FCC has thus once again failed to consider significant evidence consisting of sworn deposition testimony containing admissions by BellSouth employees that they considered ONA to be little more than "overdone" "media hype"[29] that would not result in new network services or reduce access discrimination. MCI/NAA Br. at 32-33. Given the Ga. MemoryCall Order's findings, two

---

[28] MCI/NAA Br. at 31 n.60 (quoting Creation of Access Charge Subelements for Open Network Architecture, 8 FCC Rcd 3114, 3116 (1993)).

[29] Deposition of Randall Corn at 47, In re: An Investigation into the Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services, Docket No. 880423-TP (Fla. PSC Jan. 23, 1989) (J.A. 2549). Those deposition extracts were submitted under cover of an ex parte letter from Frank W. Krogh, MCI, to Donna R. Searcy, Secretary, FCC (Mar. 15, 1991) (J.A. 1992-94). Those deposition pages are cited in MCI's Petition for Reconsideration of the BOC ONA Order (filed Feb. 24, 1989) (J.A. 443-72) and are arranged by deponent, in alphabetical order, in the Joint Appendix (J.A. 2542-2675).

years later, of access discrimination by BellSouth, the unheeded warning as to the ineffectiveness of ONA provided by this testimony was obviously quite significant. The FCC's continued, unexplained silence concerning this crucial, prophetic evidence is baffling.

MCI and NAA also cited other evidence of widespread discrimination in the record (much of which was not in the record of the MFJ Proceeding).[30] The FCC argues that although the Order did not address the evidence presented as to discrimination, it somehow responded to "the commenters' main objections to its antidiscrimination safeguards." FCC Br. at 61. FCC counsel then attributes to the Commission the implicit finding that "the opponents' anecdotal allegations [were] unpersuasive with respect to the policy issue at hand, in light of the record as a whole and the Commission's own experience in this area." Id. at 62.

One basic problem with that statement, of course, is that the Order did not say that. Instead, it was silent on the discrimination evidence. Counsel's post hoc rationales for the agency's decision are irrelevant.[31] Another problem is that the FCC cannot make hundreds of pages of record material concerning multiple examples of access discrimination magically disappear by

---

[30] MCI/NAA Br. at 34-38. See, e.g., ex parte letter from Marc S. O'Krent, President, The Telephone Connection of Los Angeles, Inc., to Donna R. Searcy, Secretary, FCC (Nov. 11, 1991) (J.A. 3117-21), discussed in MCI/NAA Br. at 34 n.69.

[31] Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962); SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947).

labelling it "anecdotal."[32] The FCC has not explained why evidence of widespread actual discrimination, including occurrences that it concedes would violate the ONA rules,[33] is irrelevant to the effectiveness of supposed antidiscrimination "safeguards."[34]

With respect to the one incident of access discrimination discussed in the Order below -- the Ga. MemoryCall Order -- the FCC argues that the abuses found in that proceeding do not impugn the effectiveness of ONA because ONA was not fully in effect at the time of the discriminatory conduct and such conduct would violate the ONA rules when the latter do become effective. The FCC notes that during the relevant period, BellSouth was operating under a service-specific Comparably Efficient Interconnection (CEI) plan.[35]

These excuses, however, fail to address a crucial problem discussed in MCI/NAA's brief -- namely that ONA, whenever it is

---

[32] See record material cited in MCI/NAA Br. at 32-38 & nn.62-63, 68-70, 84 and Joint Brief of Petitioner - Intervenors at 33 & n.110, 35 & n.115 (filed May 19, 1993) [hereinafter MCI/NAA Intervenors' Br.]. See also NCTA Reply Comments at 10-12 (J.A. 2843-45).

[33] See Order, 6 FCC Rcd at 7623 n.211 (J.A. 3185).

[34] The FCC's citation of American Mining Congress v. United States EPA, 965 F.2d 759 (9th Cir. 1992) in this connection (FCC Br. at 61) is mystifying, since, in that case, the comments to which the agency had not responded were not "significant" because they were irrelevant. American Mining Congress, 965 F.2d at 771. Here, the FCC still has not explained why evidence of rampant access discrimination is irrelevant to the issue of access discrimination.

[35] FCC Br. at 59-61. The FCC's brief (as well as footnote 211 of the Order below, 6 FCC Rcd at 7623 (J.A. 3185)) thus undercut the BOC Intervenors' contention that the conduct found in the Ga. MemoryCall Order would not have violated the FCC's ONA rules. BOC Intervenors' Br. at 29-32.

fully effective, will never be of much use to the type of local voice mail service (VMS) provider that was subjected to the discriminatory conduct found in the Ga. MemoryCall Order. This is because such VMS providers typically use intrastate services regulated by state commissions, over which the FCC has "limited" control, if any.[36] Thus, there is no reason to expect that, even once the FCC's ONA regime is fully effective, it will have any impact on the intrastate discriminatory access problems found in the Ga. MemoryCall Order and discussed elsewhere in the record. At the same time, as discussed above, interstate ONA services are too expensive. VMS providers and other ESPs are therefore left with no useful access safeguards to protect them against discrimination.[37] The FCC's brief is silent on this crucial point.[38]

---

[36] MCI/NAA Br. at 37-38 (citing BOC ONA Order, 4 FCC Rcd at 148).

[37] The FCC also mentions the absence of discrimination complaints at the FCC as further evidence supporting its reliance on ONA. FCC Br. at 62. It is not surprising that there would be no access discrimination complaints filed at the FCC by VMS providers or other small ESPs. As the Ga. MemoryCall Order demonstrates, the discrimination these ESPs experience typically occurs in intrastate access services tariffed at the state level, and, therefore, they are more likely to pursue remedies at the state level. See MCI Comments at 42 (J.A. 1704).

[38] The FCC has an especially heavy burden to explain how its ONA and other antidiscrimination rules could possibly protect local VMS providers using intrastate access services in light of the FCC's preemption of any state attempt to impose structural separation requirements for jurisdictionally "mixed" BOC enhanced services. See Order, 6 FCC Rcd at 7630-36 (J.A. 3192-98). It would be irrational for the FCC to impose a regulatory scheme on the states that provides no protection against discrimination at the intrastate level while depriving the states of a major antidiscrimination tool favored by most of the state commissions submitting comments below. See MCI/NAA Intervenors' Br. at 36-37. As in NARUC v. FCC, 533 F.2d 601, 616 (D.C. Cir. 1976)

(continued...)

4. The Order is Doomed by its Internal Inconsistencies

In its haste to avoid any blame for the conduct found in the Ga. MemoryCall Order, the FCC created several fatal inconsistencies within the Order below. The FCC's excuse that ONA and the other nondiscrimination regulations were not yet fully in effect at the time of the conduct found in the Ga. MemoryCall Order undermines its assertion that "[o]ur experience with ONA since... [California I] serves to reaffirm this conclusion [that ONA is effective]."[39] If ONA was not fully effective, there could not have been any "experience with ONA" that could "serve[] to reaffirm" any such conclusion.[40] Thus, "[t]he FCC's argument contains two obviously contradictory positions.... It does not matter which is the true position of the FCC; either way... [there is no] reasoned basis for the rule."[41]

---

[38](...continued)
(voiding preemption of state regulation while expressing concern that preemption, combined with lack of federal regulation, disadvantages some participants in market vis-a-vis others), "the Commission not only intends to preempt state regulation... but intends to issue no regulations of its own to govern these [intrastate] activities." The only control exercised by the FCC over intrastate ONA tariffs is the loose criterion that BOC state ONA tariffs "do not undermine fundamental ONA objectives." BOC ONA Order, 4 FCC Rcd at 148 (J.A. 432A).

[39] 6 FCC Rcd at 7599 (J.A. 3161); FCC Br. at 62.

[40] Nothing material happened in the development of ONA between the release date of the Ga. MemoryCall Order -- June 4, 1991 -- and the Order below -- December 20, 1991. If ONA was not fully effective before the release of the Ga. MemoryCall Order, it was not fully effective prior to release of the Order below.

[41] ALLTEL Corp. v. FCC, 838 F.2d 551, 559 (D.C. Cir. 1988). The FCC's comment about its "experience with ONA" is also rebutted by FCC Commissioner Duggan's Separate Statement
(continued...)

Again, in paragraph 63 of the Order (J.A. 3162), the FCC concludes that "the BOCs are generally meeting the basic service needs of the enhanced services industry," referring to the BOCs' ONA tariffs and plans to deploy additional ONA services. Whatever the FCC means by the phrase "the BOCs are generally meeting the basic service needs of the enhanced services industry," it apparently does not include the provision of sufficiently unbundled network features to prevent the BOCs from discriminating against ESPs, as shown by the Ga. MemoryCall Order. Moreover, if, as the FCC stated in its discussion of the Ga. MemoryCall Order, ONA was not fully effective, it is not clear how the BOCs were already "meeting the basic service needs of" ESPs as of the date of the Order below.

In its brief, the FCC backs away from its previous reliance on ONA, now arguing that "ONA is simply a part... of a larger package of antidiscrimination safeguards." FCC Br. at 56. The FCC brief argues that "regardless of the pace of ONA development, CEI equal access requirements... have continued in the interim to provide an adequate check on discrimination," id. at 59, and lauds CEI as the "primary safeguard" and the "core protection against access discrimination." Id. at 63. The FCC concludes that it was therefore reasonable for the Order to rely on the whole package -- an allegedly stronger set of safeguards than was

---

[41](...continued)
concerning the Order, in which he points out that "we do not yet have experience with federally tariffed ONA services." 6 FCC Rcd at 7645 (J.A. 3207).

approved in California I -- as an "'effective alternative to structural separation.'"[42]

The hole in that argument is that CEI and all of the other nondiscrimination safeguards were fully in effect during the period of the discriminatory conduct identified in the Ga. MemoryCall Order and elsewhere in the record, and thus are demonstrably ineffective. Indeed, BellSouth provided its MemoryCall service under a CEI plan[43] that the FCC had found to comply with all of the CEI parameters, including equal access and price parity for ESPs and BellSouth's own VMS.[44] The BellSouth CEI plan also complied with all of the FCC's other antidiscrimination requirements, including customer proprietary network information (CPNI), nondiscrimination reporting and network information disclosure.[45] Moreover, in approving the BellSouth CEI plan, the FCC's Common Carrier Bureau explicitly "prohibit[ed] BellSouth from using CPNI to identify particular customers of existing VMS competitors for 'targeted' marketing efforts."[46] Two and one-half years later, the Ga. MemoryCall Order found that BellSouth was doing exactly that. Curiously, in attempting to address this problem again by its "unhooking"

---

[42] FCC Br. at 63 (quoting Order, 6 FCC Rcd at 7576).

[43] Order, 6 FCC Rcd at 7623 n.211 (J.A. 3185).

[44] BellSouth Plan for Comparably Efficient Interconnection for Voice Messaging Services, 3 FCC Rcd 7284, 7285-90 (CCB 1988) (Addendum, Tab 4).

[45] Id. at 7291-94.

[46] Id. at 7293.

prohibition in the Order below,[47] the FCC treats it as if it were a new issue that was only first brought to the FCC's attention by the Ga. MemoryCall Order.[48] Thus, the Ga. MemoryCall Order and other discriminatory conduct reflected in the record show that although "ONA is simply a part... of a larger package," the other elements in the package are clearly worthless.

Although the Ga. MemoryCall Order provides compelling reason to question the effectiveness of the FCC's purported nondiscrimination "safeguards," the Order fails to address, much less explain, how those "safeguards" can prevent such discrimination in the future. The FCC cannot "simply ignore comments that challenge its assumptions;" it "must come forward with some explanation that its view is based on some reasonable analysis." ALLTEL, 838 F.2d at 558. The FCC's failure to do so is arbitrary and capricious.

5. The Recent Court of Appeals Decision in the MFJ Proceeding Does Not Support the Order

As noted above, the FCC's post hoc reliance on the recent opinion by the Court of Appeals for the D.C. Circuit in the MFJ Proceeding is irrelevant in this case. That decision addressed whether an antitrust consent decree should be modified to allow the BOCs to offer information services, not the regulatory regime under which they could offer such services pursuant to the Communications Act.

---

[47] Order, 6 FCC Rcd at 7613-14, 7623 n.211 (J.A. 3175-76, 3185).

[48] Id. at 7613-14 & n.168 (J.A. 3175-76).

EXHIBIT B

STATE OF TEXAS)
) ss
COUNTY OF DALLAS)

AFFIDAVIT OF PETER P. GUGGINA

Peter P. Guggina, being duly sworn and under oath deposes and states as follows:

1. I am employed by MCI Telecommunications Corporation as the Director of Technical Standards Management. My office address is 2400 N. Glenville Drive, Richardson, Texas 75082. In this capacity, I am responsible for managing a staff that plans, coordinates and executes MCI's participation in the industry forums and standards process. My position provides a daily view of the status and events that take place in these arenas. In addition to participating directly in and monitoring other MCI participants' progress, I am in constant contact with other industry participants in an attempt to resolve issues and to make the process more effective.

2. I am also my company's representative to the Board of Directors of the Alliance for Telecommunications Industry Solutions (ATIS),[1/] formerly the Exchange Carrier Standards Association (ECSA), which sponsors many telecommunications standards setting bodies and industry forums. In addition, I

[1/] ATIS's stated mission is to promote the timely resolution of national and international issues involving telecommunications standards and the development of operational guidelines.

am also MCI's representative to the American National Standards Institute (ANSI). I also serve as Vice-chair to the Carrier Liaison Committee (CLC),[2/] which provides oversight management of the ATIS/CLC forums. Further, I am Chairman of the Interexchange Carrier Industry Committee ("ICIC"), an industry group that reviews technical subject matters associated with exchange access services. Chairing the ICIC provides me additional exposure to a cross section of industry activities related to the forum and standards process. My involvement with these industry activities began in 1984, and I have over 20 years of telecommunications operation, engineering, and network planning experience.

3. I am submitting this Affidavit in connection with the FCC's proceedings in Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Docket No. 95-20.

4. Enhanced services markets will be strongly affected by the technical standards that define whether and how various public switched telephone network features and services are made available to enhanced service providers (ESPs). Quite simply, these standards, and the implementation thereof, will

---

[2/] The CLC's stated mission is to provide interindustry mechanisms for the discussion and voluntary resolution of nationwide concerns regarding the provision of exchange access and telecommunications network interconnection. The CLC is an umbrella organization for the Ordering and Billing Forum (OBF), the Network Operations Forum (NOF) and the Industry Carriers Compatibility Forum (ICCF).

determine how and when ESPs can connect in a uniform manner with the telephone network and, therefore, can be of life or death business consequence for those firms.

5. These technical standards are not set by regulatory agencies. Rather, they are developed through industry forums and standards committees. The forums and committees consist of both the telephone companies and firms that want to connect to the telephone network. Of necessity, the Regional Bell Operating Companies ("RBOCs") are major players in these forums and committees. When the RBOCs participate in these bodies as both monopoly providers of network services and competing providers of enhanced services, they have the incentive and the ability to use their power to influence decisions and resolutions that will favor their own enhanced service operations over those of non-RBOC providers. These bodies develop voluntary standards and industry solutions to problems relating to network interconnection with local exchange carriers (LECs), interexchange carriers (IXCs), ESPs and equipment vendors. Generally, the standards committees develop uniform architectures, protocols and interfaces, and the forums develop technical and operational solutions to industry issues associated with the provision and implementation of exchange access.

6. In this Affidavit, I will discuss several ways in which the RBOCs and Bellcore control or delay the outcome of

issues worked under the ATIS structure.

I. The RBOCs and Bellcore Can Control Enhanced Services Development Through Dominance of the Industry Standards and Forum Process

7. The degree of access to RBOC unbundled services and network components will be determined by the willingness of the RBOCs to reach agreements at the industry forums and to implement those agreements. The forum which was thought to affect to a large degree how enhanced services will be delivered to the market is the Information Industry Liaison Committee (IILC).[3/] The IILC is a committee under the sponsorship of ATIS. MCI, as a provider of enhanced services, and many ESPs have participated in IILC activities since its inception. However, the results of many years of effort have not yielded many tangible results. In fact, in the area of open access, unbundled network components are still not available. While the IILC has produced some high level unbundling documents, (e.g., Issue #026, Long Term Unbundling and Network Evolution) which have reached initial closure, there is no indication or assurance of when an unbundled network will be available, if ever. Issue #026, which has taken over four years of intensive discussion and work by a large task group of the IILC, is not a technical specification, but rather a high level study to examine the

---

[3/]The Information Industry Liaison Committee serves as an interindustry mechanism for the discussion and voluntary resolution of industry-wide concerns about the provision of Open Network Architecture (ONA) services and related matters.

technical and operational problems and assess their scope and possible solutions. Hence, additional technical, operational, etc. specifications remain to be developed. In addition, a long list of public policy issues have been identified, some of which are not related to unbundling and appear to be nothing more than RBOC tactical hurdles to avoid taking action. This will further confuse resolution of the issues and prolong the true implementation of open access and network unbundling. In order to bring such unbundling scenarios into reality, the RBOCs would have to solve the associated problems and perform those actions necessary for implementation.

8. The serial nature of the industry forum, standards and Bellcore processes assures that RBOC networks will not be unbundled in the foreseeable future, even if positive agreements are reached along the way, unless a regulatory mandate is imposed for a date certain or an incentive is created. The IILC issue #026 document is being "sliced" into small pieces. If the piece parts are referred to standards committees and other industry forums to work on developing additional and related industry agreements, as the RBOCs have proposed, the industry forums and standards process can take many more years, and implementation may never become a reality. It is likely that the IILC's unbundled access points document will dissipate once it is sliced into small pieces and referred to other industry forums and standards committees.

9. In its March 1995 filing in Docket 95-20, GeoNet referred to flaws in the IILC process, based on their experience with IILC Issue #044. This issue involved access to the Local Exchange Advanced Intelligent Network (AIN) by a Non-LEC switching device. GeoNet cites problems with (1) IILC issue acceptance, (2) the voluntary nature of participation, which has led to very little input from RBOC participants and (3) issue resolution consensus. Further, GeoNet claims that these flaws will severely limit the effectiveness of the IILC in resolving uniformity issues relating to new technology. MCI shares GeoNet's concerns, and believes that the problem is not as much with the IILC as it is with the strategies and objectives of RBOC participants.

10. From my experience, this situation is not limited to the IILC. Issues originated by ESPs and presented to the forum are frequently altered by RBOC participants.[4/] Hence, the scope and intent of the issues are changed in order to gain RBOC support in working the issue. So, when forum work begins, the issue under study may have little relevance to the issue originally brought to the Committee. This tactic can be used to make it more difficult to later seek regulatory or other forms of relief, since the original scope and intent are

---

4/ The industry forums utilize a formal process of issue introduction. Issue statements are utilized to define the problem to be solved. Also, the originator states a desired outcome.